Office - Supreme Court, U.
FILED
FEB 20 1953
HAROLD B. WILLEY, CLERK

Supreme Court of the United States

October Term, 1952

No. 616

MORRISTOWN TRUST CO., as Executor of the Last Will and Testament of Henry W. Williams, deceased,

Petitioner,

—against—

JOHN E. MANNING, United States Internal Revenue Collector for the Fifth District of New Jersey,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BENJAMIN HARROW,
HAROLD H. PRICE,
Attorneys for Petitioner.

ARTHUR L. HARROW,
of Counsel.

32 CASE PRESS, 30 Ferry Street, N. Y. C.—COrtlandt 7-0484-0485

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT	2
REASONS FOR GRANTING THE WRIT	4
I. The decision of the Court of Appeals that the right to recoupment or set-off is automatic and is not discretionary with the Court is in conflict with applicable decisions of this Court and with the decision of the Court of Appeals for the Sixth Circuit in *Routzahn* v. *Brown*	4
II. The inequities in the Commissioner's position are such that the lower courts should have exercised their discretionary power to deny him an equitable remedy	7
III. The lower courts' decisions represent an unwise extension of the set-off remedy, beyond the limits of that doctrine as applied in *Lewis* v. *Reynolds*	15
CONCLUSION	18

CITATIONS

Bradley, Edward E., 1 T. C. 518	9
Chemical Bank and Trust Co., 37 B. T. A. 535	9
Commissioner v. Church's Estate, 335 U. S. 632	8, 9, 10, 11, 12, 13, 15, 16, 17
Commissioner v. Irving Trust Co., 147 F. 2d 946	10
Commissioner v. Kellogg, 119 F. (2d) 54	10

PAGE

du Pont, Amy E. v. U. S. 28 F. Supp. 122 ..... 5, 6

Francisco Sugar Co. v. Commissioner, 47 F. (2d) 555 12

Helvering v. Hallock, 309 U. S. 106 ..... 9, 11

Hughes, Mary H., 44 B. T. A. 1196 9

Lewis v. Reynolds, 284 U. S. 281 .....5, 6, 8, 16

May v. Heiner, 281 U. S. 28 .....8, 9, 11, 14, 15, 16

Reinecke v. Northern Trust Co., 278 U. S. 399 10

Rothensies v. The Electric Storage Battery Co., 329 U. S. 296 ..... 7, 17

Routzahn v. Brown, 95 F. 2d 766 ..... 5, 6

Schultz, Hariot Reynolds, 38 B. T. A. 59 9

Stone v. White, 301 U. S. 532 5

Tait v. Safe Deposit & Trust Co., 70 F. (2d) 79 16

U. S. v. Jefferson Electric Co., 291 U. S. 386 5

Van Antwerp v. U. S., 92 F. (2d) 81 5

Washington Trust Co. v. Commissioner, 140 F. 2d 87 9

STATUTES

1939-1 Cum. Bull. 29, 31 9

1949-2 Cum. Bull. 293, 294, 300 10

The Doctrine of Recoupment in Federal Taxation, 28 Va. L. Rev. 577 6

Internal Revenue Code, Section 874 (a) 3, 4

Revenue Act of 1926, Section 302 (c) 17

Revenue Act of 1951, Section 607 ..... 11, 13

Technical Changes Act, c. 720, 63 Stat. 891 ..... 8, 17

Treasury Decision 5741 ..... 11, 13

Treasury Regulation 80, Art. 18 .....11, 13, 17

Treasury Regulation 105, Sec. 81.17 11

Supreme Court of the United States

October Term, 1952

No.

MORRISTOWN TRUST CO., as Executor of the Last Will and Testament of Henry W. Williams, deceased,

Petitioner,

—against—

JOHN E. MANNING, United States Internal Revenue Collector for the Fifth District of New Jersey,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioner, Morristown Trust Co., as Executor of the Last Will and Testament of Henry W. Williams, deceased respectfully prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Third Circuit which affirmed the judgment of the United States District Court for the District of New Jersey.

Opinions Below

The opinion of the District Court (R. 63a) is reported in 104 F. Supp. 621 (D. N. J. 1951). The opinion of the

Court of Appeals is reported in 200 F. 2d 194 (3rd Cir. 1952).

Jurisdiction

The judgment of the Court of Appeals was entered on November 26, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254.

Questions Presented

1. Must a court in a suit for refund of estate taxes based upon admittedly proper deductions not previously allowed permit the Commissioner to set off a claim based on other grounds, notwithstanding the fact that assessment of additional estate taxes on those grounds is barred by the statute of limitations, and that the equitable considerations are overwhelmingly in the taxpayer's favor?

2. Does such a set-off, even if granted, permit the Commissioner to do more than redetermine the taxpayer's estate tax liability on the basis of the then existing law?

Statement

Henry W. Williams died on January 30, 1936. The petitioner, as executor of his estate filed the estate tax return on December 29, 1936 and paid the estate tax of $24,583.07 shown to be due. In his return petitioner claimed deductions for executor's commissions, attorneys fees, administrative expenses, etc.

When the return was audited the Commissioner of Internal Revenue disallowed these deductions because the

amount thereof had not yet been definitely determined. On the basis of the disallowance of these deductions and the inclusion in the gross estate of seven joint and survivor annuity contracts purchased after March 3, 1931, the Commissioner on September 13, 1939 determined a deficiency of $17,016. The petitioner paid this deficiency on May 1, 1940.

After the amount of these commissions, fees, expenses, etc. had been duly fixed and determined in the New Jersey Probate Court, petitioner submitted proof thereof to the Commissioner of Internal Revenue and requested a refund of $9,379.81, the portion of the total deficiency which had resulted from the disallowance of the deduction of these items.

The Commissioner, however, in a letter dated October 26, 1942, although approving the deductions claimed, refused to make the refund on the ground that a redetermination of the entire tax showed there had been an underpayment rather than an overpayment. He reached this conclusion by asserting for the first time that the value of thirty-two joint and survivor annuity contracts purchased prior to March 3, 1931 (hereinafter sometimes called "pre-1931 annuities"), which annuities had been thoroughly examined when the return was audited in 1939, should have been included in the gross estate. No assessment of additional estate taxes could be made by the Commissioner at the time he denied the refund because the three-year limitation period prescribed by Section 874 (a) of the Internal Revenue Code had long since elapsed.

When this case came on for trial in 1951 the Commissioner defended solely on the ground that the pre-1931 annuities should have been taxed. The District Court with-

out exercising any discretion permitted him to assert this defense, and thus reached the substantive issue whether these annuities were in fact taxable. It decided this issue in favor of the Commissioner. The Court of Appeals affirmed on the opinion of the District Court.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals that the right to recoupment or set-off is automatic and is not discretionary with the Court is in conflict with applicable decisions of this Court and with the decision of the Court of Appeals for the Sixth Circuit in *Routzahn* v. *Brown*.

In this case the Commissioner is seeking to oppose Morristown Trust's suit for refund, not by challenging the validity of the deductions asserted, but by contending that the pre-1931 annuities should have been included in the gross estate. The Commissioner now makes this contention despite the fact that during the three year period following the filing of the estate tax return—the period fixed by Section 874 (a) of the Internal Revenue Code as that within which a deficiency must be asserted—the Commissioner through his agent thoroughly examined these annuities and determined that they were not taxable. It was not until October, 1942, nearly three years after the time limitation had run against the Commissioner's affirmative assertion of a deficiency based upon these annuities, that he conceived their taxability as a defense to the Morristown Trust's refund claim.

A suit for refund of taxes erroneously paid, although an action at law, is equitable in its function and is controlled by equitable principles. *Stone* v. *White,* 301 U. S. 532 (1937); *Van Antwerp* v. *United States,* 92 F. 2d 81 (9th Cir. 1937). "[Such a suit] is often called an equitable action, and is less restricted and fettered by technicalities and formalities than any other form of action. It aims at the abstract justice of the case * * * ". *United States* v. *Jefferson Electric Co.,* 291 U. S. 386, 402 (1934).

While this Court held in *Lewis* v. *Reynolds,* 284 U. S. 281 (1932), that when a taxpayer sues for a refund, the Commissioner has the right to defend by redetermining the entire tax liability in order to establish that the taxpayer has not over-paid his tax, the Commissioner's right to this defense, like the taxpayer's suit for refund, is circumscribed by equitable principles. *Amy E. duPont* v. *United States,* 28 F. Supp. 122 (D. Del. 1939). "Such defense is equitable, comparable to equitable recoupment or in diminution of the plaintiff's right to recover * * * " *Routzahn* v. *Brown,* 95 F. 2d 766, 769 (6th Cir. 1938).

Routzahn v. *Brown,* just as the instant case, involved a claim for refund of estate taxes and an attempt on the part of the Commissioner to defend by contending that a redetermination of the entire tax liability disclosed no overpayment. As in the instant case the redetermination was grounded upon the inclusion in the gross estate of items for which no additional taxes could be assessed because of the bar of the statute of limitations, and which had not been considered taxable by the Commissioner upon the original audit. The Court of Appeals refused to allow the Commissioner to assert this defense since in the circumstances involved the equities were in favor of the taxpayer.

The Court candidly considered the holding of this Court in *Lewis* v. *Reynolds* but concluded that it had the discretionary power to deny this defense to the Commissioner where the equities required it. In *Amy E. duPont* v. *United States, supra,* the District Court reached precisely the same conclusion.

Although the court below recognized that "the application of the doctrine in *Lewis* v. *Reynolds, supra,* may otherwise be governed by equitable considerations" it felt constrained to permit the Commissioner to assert this defense, despite the fact that this produced what the court admitted was a "harsh result" having "no justifiable basis." Opinion of Judge Forman (R. 74a).

It is the petitioner's contention that the court below erred in automatically permitting the Commissioner to raise the annuity issue as though this were a legal right, and in refusing altogether to exercise its discretion or to weigh the equitable factors in favor of the taxpayer which dominate this case.

The defense asserted by the Commissioner partakes of the nature both of the ancient equitable doctrine of recoupment and of set-off, a more recent outgrowth of the old recoupment remedy. See, McConnell, *The Doctrine of Recoupment in Federal Taxation,* 28 Va. L. Rev. 577 (1942). The Court of Appeals for the Sixth Circuit has stated that such a defense is based on recoupment rather than set-off, since "there is no counter-demand on him [the plaintiff], but merely a denial of his equitable right to the overpayment." *Routzahn* v. *Brown, supra,* at p. 769. This Court has indicated, however, that recoupment is only available where the defense is based upon the same transaction, *i.e.,* the same

operative facts as the plaintiff's claim. *Rothensies* v. *The Electric Storage Battery Co.*, 329 U. S. 296 (1946). Since the defense which the Commissioner asserts here in evasion of the statute of limitations is in no way based upon the same transaction as the petitioner's claim, it appears that this defense is broader than recoupment and must in some measure be based upon set-off.

It is not necessary, however, to argue at length in this petition the distinction between these remedies for it is clear that the same policy considerations of justice and equity underly both.

II.

The inequities in the Commissioner's position are such that the lower courts should have exercised their discretionary power to deny him an equitable remedy.

This Court has clearly indicated that the policies underlying limitation statutes are important in tax cases and that these statutes must not be circumvented even by resort to recoupment or set-off unless there are the most compelling reasons for doing so. In *Rothensies* v. *The Electric Storage Battery Co.*, 329 U. S. 296, 301 (1946), this Court, criticizing the Court of Appeals' extension of the scope of the recoupment remedy beyond the single transaction rule, stated:

> "It probably would be all but intolerable, at least Congress has regarded it as ill-advised to have an income tax system under which there never would come a day of final settlement * * * Hence, a statute of limitation is an almost indispensible element of fairness as well as of practical administration of an income tax policy.

> "* * * The theory [of limitation statutes] is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them."

While *Lewis* v. *Reynolds* allows the Commissioner under some circumstances to circumvent the bar of the statute of limitations and thereby raise as a defense "stale claims" having no factual relationship to the plaintiff's suit, clearly this rule should not apply where allowance of the defense would produce an inequitable result.

In this petition we have deemphasized the issue of the substantive validity of the Commissioner's defense because it involves many intricacies of the Technical Changes Act, c. 720, 63 Stat. 891, in which Congress sought to eliminate any retrocative effect of this Court's decisions in the *Church* and *Spiegel* cases. A brief consideration, however, must be given to the substantive issue, for the technical nicety upon which the conclusion of the lower courts depends makes pointedly apparent the inequity in permitting the Commissioner to raise this defense.

When the taxpayer's return was audited in 1939, the pre-1931 annuities were carefully examined by the Commissioner and he determined that they were not taxable in view of the then clearly established law. In several key cases in which the Commissioner had acquiesced, it had been held that the taxability of pre-1931 joint and survivor annuities was governed by the rule laid down by this Court in *May* v. *Heiner*, 281 U. S. 28 (1930), namely, that property should not be included in a decedent's estate simply by reason of his retention of a life interest. *Chemical Bank*

and Trust Co., 37 B. T. A. 535 (1938), *appeal dismissed without opinion* (2d Cir. 1939) (acquiesced 1939-1 Cum. Bull. 29); *Hariot Reynolds Schultz*, 38 B. T. A. 59 (1938) (acquiesced 1939-1 Cum. Bull. 31).

Helvering v. *Hallock*, 309 U. S. 106 (1940), did not disturb this rule. Though the Tax Court held to the contrary in the annuity decision of *Mary H. Hughes*, 44 B. T. A. 1196 (1941) that decision was promptly overruled by *Edward E. Bradley*, 1 T. C. 518 (1943), affirmed sub nom *Washington Trust Co.* v. *Commissioner*, 140 F. 2d 87 (2d Cir. 1944), which established that the *Hallock* case did not impliedly overrule *May* v. *Heiner*. See numerous other cases to the same effect compiled in Mr. Justice Burton's dissenting opinion in *Commissioner* v. *Church's Estate*, 335 U. S. 632 (1949).

These key annuity cases still represented the controlling law when in 1942, the Commissioner first raised the annuity issue nearly 6 years after the petitioner had filed the estate tax return. Under these cases, therefore, the Commissioner's only defense to petitioner's refund claim was invalid. Had this case come on for trial at any time prior to this Court's 1949 reversal of *May* v. *Heiner* in *Commissioner* v. *Church's Estate*, 335 U. S. 632, there is no doubt that the substantive question would have been decided adversely to the Commissioner. When the issue was finally litigated it was solely on the ground of the *Church* case that the lower courts held these pre-1931 annuities taxable.

The Commissioner did also contend that the annuities were taxable under the *Hallock* case by virtue of the survivorship contingency but this point was effectively disposed of in petitioner's reply brief to the Court of Appeals which relied chiefly upon *Reinecke* v. *Northern Trust Co.*,

278 U. S. 399 (1929), *Commissioner* v. *Kellogg*, 119 F. 2d 54 (3rd Cir. 1941), and *Commissioner* v. *Irving Trust Co.*, 147 F. 2d 946 (2d Cir. 1945).

In the courts below, petitioner showed conclusively from references to the Congressional hearings that Congress intended to eliminate all retroactive effects of the *Church* decision. (See *e.g.*, excerpts from Senate and Conference Reports in 1949-2 Cum. Bull. 293, 294, 300.) That the lower courts recognized this is shown by the following passage from the opinion of the District Court:

> " * * * an overall reading of the Committee Report generally lends credence to plaintiff's contentions [that a limitation of the Technical Changes Act to estates of decedents dying after February 10, 1939 is inconsistent with the primary Congressional intention not to apply the Church case retroactively at all] and, admittedly, there does not appear to be any justifiable basis for applying the Church doctrine retroactively only to decedents dying prior to February 11, 1939 * * * " (R. 71a).

Nevertheless, the sole justification given for the "harsh result" reached by the Court was that the limiting date of February 10, 1939 created a statutory loophole, however unanticipated, and that the court was required to construe the statute strictly. As the court stated, " * * * we cannot ignore the specific limitation in the statute even for the exigency of a hard case" (R. 74a).

The only basis for Congress' reference to February 10, 1939 was that that was the date of the enactment of the Internal Revenue Code. Congress apparently never conceived that any cases involving estates of decedents dying before that date would still be pending. That Congress

intended nothing significant by the reference to February 10, 1939 is evidenced by the amendment in Section 607 of the Revenue Act of 1951 which pushed this limiting date back to March 18, 1937 upon its being brought to Congress' attention that the Commissioner was placing some reliance upon it.

Prior to the passage of the Technical Changes Act the Commissioner had of his own volition on September 6, 1949 in Treasury Decision 5741, 14 Fed. Reg. 5536 (now incorporated in Treasury Regulation 105, Sec. 81.17), ruled that he would not apply the *Church* case to estates of decedents who died before the case was decided. The lower courts held, however, that this ruling of the Commissioner too is limited in its scope to estates of decedents dying after the statutory enactment of the Internal Revenue Code on February 10, 1939, and, therefore, that this ruling does not have binding force in the instant case.

But if the regulations under the Code do not apply, it seems clear that the Commissioner should be bound by Treasury Regulation 80, Art. 18, which was in effect at the time of the decedent's death, and at the time of the original audit of the return. This regulation embodied the rule of *May* v. *Heiner* and taken in conjunction with the Commissioner's acquiescences in the key annuity cases, showed clearly that the policy of the department was not to tax pre-1931 annuities. The courts below also permitted the Commissioner to disregard this regulation, relying on the *Hallock* and *Church* cases for the proposition that the Commissioner is not bound by regulations made under compulsion of judicial decisions. However, when Congress amended the Technical Changes Act in Section 607 of the Revenue Act of 1951, it made clear its intention that the Commis-

sioner should act in conformity with his old regulations for the years prior to the enactment of the Code. This expression of Congressional intent accords with the general rule that the Commissioner's regulations, while they stand, have the force of law and he has no power to disregard them. *Francisco Sugar Co.* v. *Commissioner,* 47 F. 2d 555 (2d Cir. 1931).

In the lower courts, petitioner urged an interpretation of the Technical Changes Act which would have avoided the limiting date, but while petitioner still believes, as suggested by the dissenting opinions in the *Church* case, that the urged construction is proper, it is not proposed to burden this Court with its consideration.

The inequities of the Commissioner's position in this case may now be summarized as follows:

(1) The original audit was carefully made, and the pre-1931 annuities were deliberately exempted from taxation. No attempt was made to tax them until after the statute of limitations had run.

(2) There was no justification for denying the claim for refund in 1942, in view of the clearly established state of the law with respect to joint and survivor annuities at that time.

(3) The attempted assessment is unduly discriminatory against this taxpayer. Both the law and the established policy of the Bureau at the time this return was audited were not to tax pre-1931 annuities. We doubt that the liability now asserted against this taxpayer was assessed against any other decedent dying possessed of such annuities in the same year. This Court is now asked to assist in

effecting a discrimination between this taxpayer and all others similarly situated. (See Mr. Justice Burton's dissenting opinion in the *Church* case at p. 699.)

(4) The alleged basis for the tax, if any exists, is a technicality, a statutory loophole neither intended nor foreseen, which results from a narrowly literal reading of the Technical Changes Act in defiance of expressed Congressional intention. Such a technicality cannot justify the granting of an equitable remedy.

(5) The Commissioner asks this Court to aid him in disregarding his own valid current Treasury Regulation 105, Section 81.17 (which incorporated T. D. 5741), promulgated after the *Church* decision and bearing the stamp of Congressional approval. His justification again is a technicality—that current Regulations are not strictly applicable to tax years before the adoption of the Internal Revenue Code. Yet the intention of T. D. 5741 was quite clear. Fair play required complete retroactive protection from the effects of an unexpected decision that changed the law of 18 years. The farther removed one is in time from the *Church* decision, the greater should be the immunity from its effects, rather than the reverse. But the Commissioner's position is that under his Regulation the effects of the *Church* decision are wiped out for the preceding 10 years, and are then revived for the years before that. This is an unreasonable and unfair position.

(6) The Commissioner also wishes to be absolved from observing Treasury Regulation 80, Art. 18, in effect at the time of the decedent's death, and at the time of the original audit. The request may or may not be legally permissible; it is certainly inequitable. Moreover, it runs counter to Congress' intent, expressed in Section 607 of the 1951

Amendment, that the Commissioner should obey applicable regulations for early years.

(7) Congress, in drafting the Technical Changes Act with the intent of eliminating the effects of the *Church* decision completely, undoubtedly drafted it with the statute of limitations in mind. Certainly, therefore, Congress did not intend the Commissioner to retain the power to invoke a set-off in order to escape the effects of the statute of limitations, and withdraw the protection of the Act from certain taxpayers. The whole purpose of the legislation—to alleviate hardship caused by reliance upon *May* v. *Heiner*—militates against the interpretation that the Commissioner was left free to tax pre-1939 decedents, whose hardship and reliance differed in no respect from that of their longer-lived compatriots.

In conclusion it is submitted that there is an easy means of avoiding the inequitable result inherent in the Commissioner's defense. The Court is not forced to choose between the so-called "plain meaning" of the statutory language and the clearly indicated contrary legislative intent. It has only to withhold from the Commissioner a discretionary, equitable remedy with which, in the total absence of any equity, he proposes to go behind the statute of limitations.

The decisions of the lower courts disregard the statute of limitations although all the equities and legislative intent are in petitioner's favor. It cannot be that the historically equitable remedies of recoupment and set-off have thus crystalized into rigid rules of law to be mechanically applied. If that be so, the policy considerations behind the statute of limitations, which this Court has often indicated are strong and not to be disregarded save for sound counteravailing policy reasons, have suffered a serious setback.

III.

The lower courts' decisions represent an unwise extension of the set-off remedy, beyond the limits of that doctrine as applied in *Lewis* v. *Reynolds*.

Even if the lower courts were correct in holding that they lacked the discretionary power to deny the Commissioner the right to assert a defensive set-off, the petitioner is still entitled to recover on his claim for refund. For the set-off defense permits the Commissioner to do no more than recompute the estate tax liability as it existed at the time the statute of limitations expired, in accordance with the then-prevailing law. That law was the rule of *May* v. *Heiner*, as laid down by this Court, under which these pre-1931 annuities were not taxable.

Consider the argument of the Commissoner. He asks not merely to be returned to the position he was in before the barrier of the statute of limitations had fallen, but he wishes to take back with him a substantive change in the construction of the tax laws that occurred eight years later, when the *Church* case was decided.

The set-off remedy has never been—nor should it now be—permitted to do more than restore to the Commissioner the same substantive rights he enjoyed before the statute of limitations had run. It should certainly not enlarge those rights, for that would not be equitable, and it is only for equitable reasons that disregard of the passage of the statute of limitations can ever be justified.

In all previous cases where a defensive set-off was permitted by the courts, the liability established was always one that could successfully have been imposed originally under the law as it then existed.

As stated in *Lewis* v. *Reynolds,* the set-off must consist of amounts which "might have been properly assessed and demanded". In this case, it would not have been proper for the Commissioner to assess a tax upon these pre-1931 annuities at any time before the statute of limitations had run, and it was precisely because he recognized that fact that no assessment was made.

This is the first case in which an actual change in the tax law, as construed by the courts, has been retroactively applied to a period before the passage of the statute of limitations. The lower courts cited *Tait* v. *Safe Deposit & Trust Co.,* 70 F. 2d 79 (4th Cir. 1934) as a precedent for its decision. But the *Tait* case is clearly distinguishable. There the *law itself* did not change in the years between the running of the Statute of Limitations and the time that the set-off was claimed. What happened was that the Commissioner initially made an erroneous interpretation of the law which the courts later corrected.

The *Tait* case is therefore no authority for the proposition that an actual change in the law may be utilized by the Commissioner upon a set-off. It is only by recourse to the theory of judicial continuity that the instant decision can logically be justified. The court must be prepared to say that the law did *not,* in fact change; that it was always as stated in *Commissioner* v. *Church,* and that the rule of *May* v. *Heiner* was never the law, and, once over-ruled, it was as though it had never existed. Such an argument may have some validity as a philosophical concept; but it is certainly unrealistic, and has no place at all in the practical and orderly administration of the tax laws. *May* v. *Heiner was* the law in the most tangible possible way. It was applied by all the Federal Courts for a period of 18 years; it was

generally applied by the Commissioner after his promulgation of Regulation 80, Article 18; it was applied by the Commissioner in this very case upon the original audit of the return, when these pre-1931 annuities were deliberately excluded from taxation; and, finally, it was accepted and adopted as the correct interpretation of Section 302 (c) of the Revenue Act of 1926 by Congress, as evidenced by the Joint Resolution of March 3, 1931 and the Revenue Act of 1932 (dissenting opinions in the *Church* case) and by the passage of the Technical Changes Act, which was accompanied by legislative statements expressing approval of the position taken by the three dissenting Justices in the *Church* case).

The full implications of the lower court's decision are not pleasant to contemplate. The bald facts of this case are that the estate of a decedent has been subjected to a tax by virtue of a change in the law occurring eight years after the statute of limitations had run and 13 years after the decedent's death. If this decision is permitted to stand then every taxpayer who has paid an assessment under protest and has a claim for refund pending, must apprehend changes in the tax law occurring a decade or more after a return has been filed and audited in good faith. Such a state of affairs is quite inconsistent with the public policy, which underlies the statute of limitations. And the position of this court on the importance of the statute of limitations in the income tax field has been unequivocal. We refer, once again, to the language used in *Rothenzies* v. *The Electric Storage Battery Company,* 329 U. S. 296 (1946), which is quoted at pages 7, 8 of this petition.

According to the position taken by the Commissioner in this case, there not only never comes a "day of final settle-

ment", but there never even comes a day when a taxpayer can say with any assurance that he knew what set of judicial decisions governs his case, since they may not yet have been decided.

That cannot be the law. This Court should hold that the dropping of the barrier of the statute of limitations freezes the applicable substantive law as of that date, and insulates taxpayers against subsequent changes in the tax laws. The lower court's decision would undermine the statute of limitations and open the floodgates to set-off claims for bygone years, whenever a judicial tax decision has been overturned.

CONCLUSION

For the foregoing reasons the petition should be granted.

February, 1953.

Respectfully submitted,

BENJAMIN HARROW,
HAROLD A. PRICE,
Attorneys for Petitioner.

ARTHUR L. HARROW,
of Counsel.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Argument	5
Conclusion	11
Appendix	12

CITATIONS

Cases:

Commissioner v. *Church's Estate*, 335 U. S. 632	6, 7
Commissioner v. *Clise*, 122 F. 2d 998, certiorari denied, 315 U. S. 821	6
Commissioner v. *Wilder's Estate*, 118 F. 2d 281, certiorari denied, 314 U.S. 634	6
Dupont v. *United States*, 28 F. Supp. 122	10
Helvering v. *Hallock*, 309 U. S. 106	6, 7
Helvering v. *Richter*, 312 U.S. 561	8
Hormel v. *Helvering*, 312 U. S. 552	8
Klein v. *United States*, 283 U. S. 231	6, 7
Lewis v. *Reynolds*, 284 U. S. 281	5, 6
May v. *Heiner*, 281 U. S. 238	6
Mearkle's Estate v. *Commissioner*, 129 F. 2d 386	6
Rothensies v. *Electric Battery Co.*, 329 U. S. 296	10
Routzahn v. *Brown*, 95 F. 2d 766	9, 10
Stone v. *White*, 301 U. S. 532, rehearing denied, 302 U. S. 639	10
Vandenbark v. *Owens-Illinois Glass Co.*, 311 U. S. 538	8

Statutes:

Act of October 25, 1949, c. 720, 63 Stat. 891, Sec. 7 (26 U.S.C. 1946 ed., Supp. III, Sec. 811)	7, 8, 13
Internal Revenue Code, Sec. 811 (26 U.S.C. 1946 ed., Sec. 811)	7
Revenue Act of 1926, c. 27, 44 Stat. 9, Sec. 302	8, 12
Revenue Act of 1932, c. 209, 47 Stat. 169, Sec. 803	12
Revenue Act of 1951, c. 521, 65 Stat. 452:	
Sec. 607	8, 15
Sec. 609	15